Tang Yew Sien & Anor (t/a New Goldmine Enterprise) v Teoh Chin Kee

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-696–12 OF 2013
VAZEER ALAM MYDIN J
6 MAY 2016

Contract — Breach — Management agreement — Whether defendant breached agreement — Whether defendant applied to have business licences cancelled — Whether plaintiffs carried out renovations to building — Whether plaintiffs' claim was sham — Counterclaim — Whether defendant successfully established his claim for damages arising from arson by plaintiffs — Whether proven that it was plaintiffs' plan to destroy building by fire so as to make fraudulent insurance claim — Damages — Whether defendant entitled to damages arising from fire set by plaintiffs — Whether defendant can claim for diminution in value of building he had to sell — Whether plaintiffs liable to compensate defendant for loss of income

Evidence — Burden of proof — Whether onus of establishing that defendant applied to have business licences cancelled rested on plaintiffs

The defendant had been operating a karaoke business at a building he owned in Kuala Lumpur. He entered into a management agreement ('the agreement') dated 1 January 2013 with the plaintiffs. Under the agreement the defendant had granted the plaintiffs permission to manage, operate and carry on the karaoke business in the building upon the payment of a management fee of RM55,000 per month by the plaintiffs to the defendant. It was also a term of the agreement that the plaintiffs would retain all income and revenue from the business and that the defendant would renew all the licences required for the lawful operation of the business. The plaintiffs claim that in reliance on the terms of the agreement they had spent a sum of RM3,424,023 to renovate the business premises. However, the plaintiffs discovered that the defendant had on 28 December 2012 applied to DBKL for the cancellation of all the business licences. As a consequence, the plaintiffs had written to inform the defendant that they were terminating the agreement. The plaintiffs then filed the present suit against the defendant for breach of the agreement. By way of this action the plaintiffs claimed damages in the sum of RM3,424,023, being the cost of the renovations they had incurred, RM462 being the stamp duty on the agreement together with interest and costs. The defendant denied the plaintiffs' claim as a sham. In his defence the defendant averred that he had not applied to the DBKL for a cancellation of the business licences and that the signatures on the

application forms to terminate the licences were forged. The defendant further stated that the plaintiff had not carried out any renovation work on the building and that it was the defendant who had carried out renovations at a total cost of RM4,066,110 to the building. It was the defendant's case that he had entered into a management agreement that allowed the plaintiffs to manage the karaoke business from 5 September 2012 for a monthly management fee of RM55,000 and that the plaintiffs had falsely and unilaterally amended the monthly management fee to RM15,000 and the date to 1 January 2013 so as to pay a lesser stamp duty. In addition the plaintiffs had, without informing the defendant, taken out an insurance policy to cover risk against fire damage to the furniture and fittings in the building, even though they did not have an insurable interest in the building or the furniture, fixtures and fittings. It was also the defendant's case that the plaintiffs were responsible for the fire that broke out in the building on 5 March 2013 and that they had made a false claim under the fire risk insurance policy. Consequently the defendant filed a counterclaim claiming damages arising from the fire set by the plaintiffs and damages arising from the plaintiffs' breach of the agreement, ie their failure to pay the management fees for the months of January and February 2013.

Held, dismissing the plaintiffs' claim and allowing the defendant's counterclaim:

(1) The law is well settled that the burden of proof would rest upon the party who desired any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserted. Therefore the onus of establishing that the defendant applied to have the business licences cancelled by DBKL or the genuiness of the signature on the relevant forms rested on the plaintiffs. It was clear from the evidence that it was more probable than not that the application for the cancellation of the licences was done by the plaintiffs as part of a scheme undertaken by them to make a false insurance claim, when they had no insurable interest (see paras 23–26).

(2) The plaintiffs were unable to provide any documentary evidence that would support their claim for renovation costs of RM3,424,023. In the absence of any credible independent evidence it would seem that the plaintiffs' claim for renovation costs was a sham. The defendant, on the there hand, had produced bank statements and scanned cheque images to show payments that had been made by his companies against the invoices for the renovation works. The defendant had provided ample documentary evidence showing the extensive renovation works it had carried out to the building between 2010 and 2011. In the light of this evidence, it defied logic for the plaintiffs to have carried out similar renovation works to the building, hardly a year later. Instead the plaintiffs act of insuring the furniture, fixtures and fittings in the building almost

immediately after taking possession of the same and knowing they did not have an insurable interest in the same, showed that this was nothing but a part of the plaintiffs' plan to destroy the building by fire and to make a fraudulent insurance claim (see paras 36–37 & 45).

(3) The evidence of the defendant's witnesses on the cause of the fire as being deliberate set at multiple points by persons in control of the building with the aid of ignitable liquid in the form of petrol or kerosene was well supported by the evidence tendered. The testimonies of the expert witness was not only comprehensive but also well reasoned. However, the plaintiffs, who were in control and possession of the building at the material time did not give any plausible reasons for the presence of combustible liquid at various places where the ignition was found to have started. This coupled with the plaintiffs' clear motive deliberately set fire to the building with the intention of making a false insurance claim meant that the defendant had successfully established his claim for damages arising from arson by the plaintiffs. As such, the defendant would be entitled to claim for losses arising directly from the plaintiffs' deliberate act of setting the building on fire (see paras 62–63, 66 & 69–70).

(4) The defendant claimed damages for diminution in the value of the building based on the fact that he had to sell the building at a price well below the market value. There was uncontroverted evidence that as a result of the substantial fire damage, the defendant had to force sell the building at a price of RM6m. That diminution in the sale less the amount received by the defendant from his insurance company for the fire damage to the property amounted to RM1,880,000, which should be allowed as general damages (see paras 71–72).

[Bahasa Malaysia summary

Defendan menjalankan perniagaan karaoke di bangunan yang dimilikinya di Kuala Lumpur. Dia telah memasuki perjanjian pengurusan ('perjanjian tersebut') bertarikh 1 Januari 2013 dengan plaintif-plaintif. Di bawah perjanjian defendan telah memberikan kebenaran kepada plaintif-plaintif untuk mengurus, mengoperasi dan menjalankan perniagaan karaoke dalam bangunan tersebut setelah membayar fi RM55,000 setiap bulan oleh plaintif-plaintif kepada defendan. Ia juga terma perjanjian tersebut bahawa plaintif-plaintif akan mengekalkan semua pendapatan dan hasil daripada perniagaan tersebut dan bahawa defendan akan memperbaharui semua lesen-lesen yang dikehendaki untuk operasi sah perniagaan tersebut. Plaintif-plaintif mendakwa bahawa dengan bergantung kepada terma perjanjian tersebut mereka telah membelanjakan sejumlah RM3,424,023 untuk mengubahsuai premis perniagaan. Walau bagaimanapun, plaintif-plaintif mendapati bahawa defendan telah pada 28 Disember 2012 memohon kepada DBKL untuk pembatalan semua lesen-lesen perniagaan

tersebut. Akibat daripada itu, plaintif-plaintif telah menulis untuk memberitahu defendan bahawa mereka akan menamatkan perjanjian tersebut. Plaintif-plaintif kemudian telah memfailkan guaman ini terhadap defendan kerana pelanggaran perjanjian tersebut. Melalui tindakan ini plaintif-plaintif menuntut ganti rugi sejumlah RM3,424,023, iaitu kos pengubahsuaian yang terakru oleh mereka, RM462 iaitu duti setem untuk perjanjian tersebut beserta faedah dan kos. Defendan menafikan tuntutan plaintif-plaintif sebagai satu penipuan. Dalam pembelaannya defendan menegaskan bahawa dia tidak memohon kepada DBKL untuk pembatalan lesen-lesen perniagaan dan bahawa tandatangan-tandatangan atas borang-borang permohonan untuk menamatkan lesen-lesen tersebut telah dipalsukan. Defendan selanjutnya menyatakan bahawa plaintif tidak menjalankan apa-apa kerja pengubahsuaian ke atas bangunan tersebut dan bahawa ia adadalah defendan yang menjalankan pengubahsuaian pada kos keseluruhan RM4,066,110 ke atas bangunan tersebut. Ia adalah kes defendan bahawa dia telah memasuki perjanjian pengurusan yang membenarkan plaintif-plaintif menguruskan perniagaan karaoke tersebut dari 5 September 2012 dengan fi perngurusan bulanan RM55,000 dan bahawa plaintif-plaintif telah secara palsu dan unilateral meminda fi pengurusan bulanan kepada RM15,000 dan tarikh 1 Januari 2013 agar membayar duti setem yang lebih kurang. Tambahan pula plaintif-plaintif telah, tanpa memberitahu defendan, mengelarkan polisi insurans untuk melindugi risiko dariapda kerosakan akibat kebakaran kepada perabot dan kelengkapan dalam bangunan tersebut, meskipun mereka tidak mempunyai kepentingan yang boleh diinsuranskan dalam bangunan tersebut atau perabot, lekapan dan kelengkapan. Ia juga kes defendan bahawa plaintif-plaintif adalah bertanggungjawab untuk kebakaran yang berlaku dalam bangunan tersebut pada 5 Mac 2013 dan bahawa mereka telah membuat tuntutan palsu di bawah polisi insurans risiko kebakaran itu. Berikutan itu defendan telah memfailkan tuntutan balas menuntut ganti rugi yang timbul daripada kebakaran yang dilakukan oleh plaintif-plaintif dan tuntutan yang timbul daripada pelanggaran perjanjian oleh plaintif-plaintif, iaitu kegagalan mereka membayar fi pengurusan untuk bulan Januari dan Februari 2013.

Diputuskan, menolak tuntutan plaintif-plaintif dan membenarkan tuntutan balas defendan:

(1) Undang-undang adalah tetap bahawa beban bukti terletak pada pihak yang menginginkan mana-mana mahkamah memberikan penghakiman berhubung apa-apa hak atau liabiliti sah bergantung kepada kewujudan fakta yang ditegaskannya. Oleh itu beban membuktikan bahawa defendan memohon untuk lesen-lesen perniagaan dibatalkan oleh DBKL atau ketulenan tandatangan pada borang-borang berkaitan terletak pada plaintif-plaintif. Ia adalah jelas daripada keterangan bahawa ia lebih berkemungkinan daripada tidak bahawa permohonan untuk pembatalan lesen-lesen itu telah dilakukan oleh plaintif-plaintif sebagai

sebahagian daripada rancangan yang dilakukan oleh mereka untuk membuat tuntutan insurans palsu, walhal mereka tiada kepentingan yang boleh diinsuranskan (lihat perenggan 23–26).

(2) Plaintif-plaintif tidak dapat mengemukakan apa-apa keterangan dokumentar yang menyokong tuntutan mereka untuk kos pengubahsuaian RM3,424,023. Tanpa apa-apa keterangan berasingan yang boleh dipercayai ia kelihatan seperti tuntutan plaintif-plaintif untuk kos pengubahsuaian tersebut adalah satu penipuan. Defendan, sebaliknya, telah mengemukakan penyata bank dan mengimbas imej-imej cek untuk menunjukkan bayaran yang telah dibuat oleh syarikatnya dengan invois-invois bagi kerja pengubahsuaian itu. Defendan telah mengemukakan keterangan dokumentar yang mencukupi menunjukkan banyak kerja pengubahsuaian yang dijalanlan olehya ke atas bangunan tersebut antara 2010 dan 2011. Berdasarkan keterangan ini, ia tidak logik untuk plaintif-plaintif menjalankan kerja pengubahsuaian yang sama ke atas bangunan tersebut, tidak lebih daripada setahun kemudian. Sebaliknya plaintif-plaintif telah bertindak menginsuranskan perabot, lekapan dan kelengkapan dalam bangunan tersebut hampir sejurus selepas mengambil milikan yang sama dan mengetahui mereka tidak mempunyai kepentingan yang boleh diinsuranskan dalam bangunan tersebut, menunjukkan bahawa ini tidak lain tetapi sebahagian daripada rancangan plaintif-plaintif untuk merosakkan bangunan tersebut dengan membakar dan membuat tuntutan insurans yang palsu (lihat perenggan 36–37 & 45).

(3) Keterangan saksi-saksi defendan berhubung sebab kebakaran itu sebagai suatu yang disengajakan yang ditetapkan di pelbagai tempat oleh mereka yang mempunyai kawalan ke atas bangunan tersebut dengan bantuan cecair yang boleh bakar dalam bentuk petrol atau minyak tanah adalah disokong dengan keterangan yang ditenderkan. Testimoni saksi pakar bukan sahaja komprehensif tetapi juga kukuh alasannya. Walau bagaimanapun, plaintif-plaintif, yang mempunyai kawalan dan milikan ke atas bangunan tersebut pada masa matan tidak memberikan apa-apa sebab yang munasabah untuk kehadiran cecair yang boleh bakar di pelbagai tempat di mana pencucuhan didapati bermula. Ini bersama motif jelas plaintif-plaintif yang sengaja memulakan kebakaran kepada bangunan tersebut dengan niat membuat tuntutan insurans palsu bermaksud bahawa defendan telah berjaya membuktikan tuntutannya untuk ganti rugi yang timbul daripada kebakaran yang dilakukan oleh plaintif-plaintif. Oleh itu, defendan berhak menuntut kerugian akibat langsung daripada tindakan plaintif-plaintif yang sengaja membakar bangunan tersebut (lihat perenggan 62–63, 66 & 69–70).

(4) Defendan menuntut ganti rugi untuk pengurangan dalam nilai bangunan tersebut berdasarkan fakta bahawa dia terpaksa menjual

bangunan tersebut pada harga yang lebih rendah daripada nilai pasaran. Terdapat keterangan yang tidak dipertikaikan bahawa akibat daripada kerosakan kebakaran yang substansial itu, defendan terpaksa menjual bangunan tersebut pada harga RM6 juta. Pengurangan dalam jualan yang kurang daripada jumlah yang diterima oleh defendan daripada syarikat insuransnya untuk kerosakan kebakaran kepada hartanah berjumlah RM1,8880,000, yang mana patut dibenarkan sebagai ganti rugi am (lihat perenggan 71–72).]

Notes

For cases on breach in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3443–3865.

For cases on burden of proof in general, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 653–1032.

Cases referred to

Alghussein Establishment v Eton College [1991] 1 All ER 267, HL (refd)

Berjaya Sompo Insurance Berhad v Nilai Porcelain Inn Sdn Bhd [2015] 4 MLJ 128, CA (refd)

Chiew Lip Seng v Perwira Habib Bank (M) Bhd [1999] 1 MLJ 310, HC (refd)

Dr Lo Sook Ling Adela v Au Mei Yin Christina & Anor [2002] 1 SLR 408, CA (refd)

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61; [1997] 2 CLJ 153, FC (refd)

Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145, FC (refd)

Owners of Dredger Liesbosch appellants; and Owners Oof Steamship Edison respondents [1933] AC 449, HL (refd)

Penguasa (Jabatan Tanah & Survei, Bintulu) & Ors v Amit bin Salleh & Ors [2008] 4 MLJ 567; [2008] 4 CLJ 143, CA (refd)

Polemis and Furness, Withy & Co, Ltd, Re [1921] All ER Rep 40; [1921] 3 KB 560, CA (refd)

Sim Ah Oh v PP [1962] 1 MLJ 42; [1961] 1 LNS 124 (refd)

Sim Ah Song & Anor v Rex [1951] 1 MLJ 150; [1951] 1 LNS 83 (refd)

Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1, FC (folld)

Standard Chartered Bank v KTS Sdn Bhd [2006] 4 MLJ 617; [2006] 4 CLJ 79, FC (refd)

Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673, CA (refd)

Tiagaraja a/l Palaniandy (as the administrator for the estate of Palaniandy a/l Pichay Karan, deceased) v Moganadas a/l Maniam (as the personal representative of Maniam a/l Kathan, deceased) & Anor [2011] 7 MLJ 326, HC (refd)

Legislation referred to

Evidence Act 1950 s 101
National Archives Act 2003
Rules of Court 2012 O 24 r 5

Ganesh Perumal (Shasha Aquilah bt Aziz with him) (Ganesh & Co) for the plaintiffs.
V Jeya Kumar (Noor Nasyrah bt Samir with him) (Kanesalingam & Co) for the defendant.

Vazeer Alam Mydin J:

[1] The plaintiffs claim damages for breach of contract. Whilst the defendant counterclaims for damages arising from property damage as a result of arson.

[2] The facts are as follows. From October 2011–March 2012, the defendant through his company known as Perfect Skyline Sdn Bhd, had been operating a karaoke business known as Kelab Goldmine at a four storey building bearing No 74, Jalan Jejaka 9, Taman Maluri Cheras, Kuala Lumpur ('the building'). The building was owned by the defendant.

[3] The plaintiffs had entered into an agreement with the defendant to take over the management of the karaoke business from the defendant. The plaintiffs allege that this was in accordance to the terms of a management agreement dated 1 January 2013 (exh P1 — Bundle C1 at pp 1–7) for a term of three years. The defendant has for his part tendered another management agreement dated 1 January 2013 (exh D4 — Bundle C2 at pp 1–5) and state that this is actual agreement executed between parties and not that tendered by the plaintiffs. Both agreements are hereinafter referred to as 'the management agreement' and where necessary to differentiate between the two, I have used the exhibit numbering to identify the respective agreements.

[4] There are significant differences between the two management agreements. The key differences of the terms and conditions of the respective versions, for the purposes of this action, are:

The plaintiffs' version (P1)	The defendant's version (D4)
Clause 4	Clause 1

In consideration during of the Licensee permitting the Manager to manage, operate and carry on the said business as the Manager's profit during the terms of this Agreement, the Manager promises to pay the Licensee a fixed sum of RM15,000.00 only per month in advance without demand on/before the 7th day of each calendar month commencing from the date the Manager commences the said business as on 1January 2013	In consideration of the Licensee permitting the Manager to manage, to operate and to carry on the said business and receive and retain all the proceeds of the said business as the Manager's profit during the terms and conditions of this Management Agreement, and the Manager is to pay the licensee a fixed sum of RM55,000.00 per month in advance without demand on or before the 5th day of each calendar month commencing from the date the Manager commences the said business. Upon execution of this Agreement, this shall valid for the period of 3 years from the date of this Agreement or the date the Manager commences of the said business.
Clause 5(xiii) To maintain the premises in the presented condition. If the Manager carry out any renovations to the premises, the renovations must be removed upon expiration of this Agreement and the premises must be returned to the Licensee in the same condition – 'as is where is basis'	Clause 9 To maintain all the interior renovation and the exterior of the said Premises in good condition and not to carry out any alterations to the Licensee and without the writing approval from the Licensee and the relevant Government Authorities.

THE PLAINTIFFS' CLAIM

[5] The plaintiffs' pleaded case is that though the management agreement is dated 1 January 2013, the plaintiffs had taken over and begun to manage and operate the karaoke business on 5 September 2012, ie even before the management agreement was inked.

[6] The plaintiffs further state in para 9 of the statement of claim that in accordance to cl 4 of the management agreement, the plaintiffs were to pay the defendant the sum RM55,000 per month as management fee and were otherwise entitled to retain all income and revenue from the karaoke business.

[7] The plaintiffs further aver that in reliance of the representations of the defendant that he would renew and keep alive and valid all licences required for lawful operation of the karaoke business and in further reliance on the terms of the management agreement ('P1'), they had spent a sum of RM3,424,023 to renovate the business premises.

[8] According to the plaintiffs, despite these assurances by the defendant,

the business premises was frequently raided by DBKL officers and when the plaintiffs checked on the status of these business licences, they found that the defendant had on 28 December 2012 applied to DBKL for the cancellation of all these business licences. The plaintiffs aver in para 18 of the statement of claim that this act of the defendant is in breach of the terms of the management agreement ('P1'). The plaintiffs further aver that the defendant knew well that the representations that he had made in regards to the business licences were false when he executed the managament agreement P1 on 1 January 2013 as he had prior to that date applied to DBKL to cancel the licences.

[9] The plaintiffs aver that, as a consequence, the plaintiffs wrote to the plaintiff vide letter dated 19 April 2013 informing the defendant that the plaintiffs were terminating the management agreement P1 on grounds of the defendant's aforesaid contractual breach in having the business licences cancelled by DBKL.

[10] In premise of the above, the plaintiffs claim damages in the sum of RM3,424,023 being the cost of renovations to the premises allegedly carried out by the plaintiffs, together with the sum of RM462 being the stamp duty paid on the management agreement P1 together with interest and cost.

THE DEFENCE AND COUNTERCLAIM

[11] The defendant denies the plaintiffs' claim and states that the plaintiffs' claim is nothing but a sham. The defendant states that he did not at anytime apply for the cancellation of the business licences from DBKL. The defendant contends that the business licences have been reinstated by DBKL upon the defendant's notification to DBKL that his signature on the application forms to terminate the licences were forged.

[12] The defendant further states that the plaintiffs' claim is not sustainable since the plaintiffs had not carried out any renovation work on the building whatsoever as it was the defendant who had carried out extensive upgrading renovation works to the buidling at a total cost of RM4,066,110.

[13] The defendant further contends that the plaintiffs' claim is founded upon a series of unlawful acts including forgery and arson. The defendant states that, whilst it is true that the defendant gave permission to the plaintiffs to manage the karaoke business from 5 September 2012 and entered into a management agreement on 5 September 2012 for a monthly management fee of RM55,000, the plaintiffs have fudged this agreement by unilaterally amending the monthly management fee to RM15,000 and had falsely dated the agreement 1 January 2013 and paid stamp duty on this lesser sum.

[14] The defendant states that in breach of the management agreement ('D4'), the plaintiff had failed to pay the monthly management fee of RM55,000 for the months of January and February 2013.

[15] The defendant states that the plaintiffs, without informing the defendant, had taken out an insurance policy with Berjaya Sompo Insurance Bhd to cover risk against fire damage to the furniture and fittings in the building, knowing well that the plaintiffs do not have any insurable interest in the buidling or its furniture, fixtures and fittings. The defendant came to know that at around 6am on 5 March 2013 the said building was on fire, and that the Fire and Rescue Department acting on a call from the public had deployed personnel and equipment from several stations of the Fire and Rescue Department to help put out the fire.

[16] The defendant contends that the fire took place while the plaintiffs were still in possession and control of the said Building and were still operating the karaoke business. The fire was finally put out late in the afternoon of 5 March 2013, whereupon the defendant was informed that the interior of the building was substantially destroyed. The plaintffs had according to the defendant made a false claim on the fire risk insurance policy that they had taken out with Berjaya Sompo.

[17] In this regard, the defendant has made a counterclaim against the plaintiffs wherein the defendant contends that the plaintiffs had, by themselves and/or their servants and/or agents, deliberately set or caused to set the said building on fire with the ulterior motive and criminal intention to obtain the insurance claim. Therefore, the defendant is claiming damages arising from the fire set by the plaintiffs. The defendant is also claiming for damages arising from the plaintiffs' breach of the management agreement ('D4').

THE WITNESSES AND DOCUMENTS

[18] The witnesses called to testify at court are as follow:

The plaintiffs' witnesses:

No.	PW	Details	Witness Statement (Exhibit)
1.	PW1	Wan Noorzuliana bt Wan Hussin, Pegawai Tadbir DBKL	
2.	PW2	Ho Pui Meng, second plaintiff	PWS1, PWS1A
3.	PW3	Rohaizat bin Ruzali, Pegawai Penyiasat Kebakaran, Bahagian Penyiasatan Kebakaran	

4.	PW4	Tang Yiew Sien, first plaintiff	PWS2, PWS2A
5.	PW5	Yang Chow Yong, contractor for renovation works	PWS3, PWS3A
6.	PW6	Not Azlina bt Mat Rajudin, Pegawai Bomba	

The defendant's witnesses:

No.	DW	Details	Witness Statement (Exhibit)
1.	DW1	Teoh Chin Kee, the defendant	DWS1, DWS1A, DWS1B
2.	DW2	Mohd Rozi bin Jusoh, Pegawai Bomba	
3.	DW3	Kah Lee Hwa, businesswoman	DWS2, DWS2A
4.	DW4	Teo Chang Huay, Senior Manager of Claim Department, Berjaya Sompo Insurance Bhd	
5.	DW5	Goh Jooi Seng, Advertising, *China Press*	
6.	DW6	Tan Sock Kim, retired senior interpreter	
7.	DW7	Azizan Ismail, Penguasa Kanan Bomba	
8.	DW8	Siti Nur Musliha bt Mohamad Nor, Pegawai Sains yang diwartakan sebagai Pemeriksa Dokumen	
9.	DW9	Imam Bukhari bin Sisami, Penolong Kanan Penguasa	
10.	DW10	Azmi bin Deris, registered valuer,	
11.	DW11	Aini Ling Juh Chin, Consultant Engineer from Forensic Services (M) Sdn Bhd	DWS4
12.	DW12	Tan Sok Ling, Chemist from Forensic Services (M) Sdn Bhd	DWS3
13.	DW13	Wong Kien Cheong, Manager, Crawford & Company Adjusters (Malaysia) Sdn Bhd	DWS5
14.	DW14	Lim Chin Keong, Insurance Adjuster, Maclaren Saksama	

[19] The bundles of documents marked at trial are as follow:

No.	Marked	Documents
1.	IP	Ikatan pliding
2.	B1	Common bundle of documents (Bundle B)(P)

3.	B2	Common bundle of documents (Bundle B)(D)
4.	B3	Supplementary common bundle of documents (Bundle B)(P)
5.	B4	Supplementary common bundle of documents (Bundle B)(D)
6.	B5	Supplementary common bundle of documents (Bundle B)(P)(II)
7.	B6	Supplementary common bundle of documents (Bundle B)(D)(II)
8.	C1	Common bundle of documents (Bundle C)(P)
9.	C2	Common bundle of documents (Bundle C)(D) – The invoices in pp 6–100 were initially in Part C but it placed in as Part B once the scanned cheques images were produced.
10.	C3	Supplementary common bundle of documents (Bundle C)(P)
11.	C4	Supplementary common bundle of documents (Bundle C)(D) – The invoices were initially in Part C but it was placed in as Part B once the scanned cheques images were produced.
12.	C5	Supplementary common bundle of documents (Bundle C)(D) II – The invoices were initially in Part C but it was placed in as Part B once the cheques images were produced.
13.	C6	Supplementary Common Bundle of Documents (Bundle C)(D) III
14.	D	Defendant's additional bundle of documents dated 13 March 2015 – Pages 1–23 are the invoices and payment vouchers were initially in Part C but it was placed in as Part B once the cheques images were produced.
15.	D1	Defendant's additional bundle of documents (II) dated 10 April 2015
16.	D2	Defendant's additional bundle of documents (III) – Combination of all the invoices, payment vouchers and scanned cheque images
17.	D3	Specimen documents used by handwriting expert
18.	D4	Defendant's additional bundle of documents (III)

The exhibits were marked as follows:

No.	Marked	Exhibits
1.	P1	Pages 1–7 of C1 – The plaintiffs' version of management agreement dated 1 January 2013
2.	P2	Pages 8–23 of C1 – Revised quotations of fit-out works of the New Goldmine from MST Decoration to Ho Pui Meng/Tang Yew Sien/New Goldmine Enterprise.
3.	P3	Pages 24–26 of C1 – Invoices and official receipts from MST Decoration to New Goldmine Enterprise
4.	P4	Pages 1–5 of C2 – The defendant's version of the management agreement dated 1 January 2013
5.	P5	Page 5 of B3 – Salinan Laporan Kebakaran/Kecemasan to New Goldmine Enterprise dated 13 March 2013
6.	P6	Pages 1–11 of C3 – Official receipts from MST Decoration to New Goldmine
7.	P7	Laporan penyiasatan kebakaran
8.	P8	Laporan kebakaran Jabatan Bomba
9.	P8A	Salinan laporan kebakaran kecemasan 24 November 2013
10.	D10	Salinan laporan kebakaran/kecemasan
11.	D11	Policy scheduled dated 30 October 2012
12.	D12	Insurance Quotation Business Insure Pack
13.	D13	Invoices, advertisements, payment voucher and advertisement form, The China Press
14.	D14	Pages 84–86 of D1 Report (Laboratory No 15-FR-B-04155 and 15-FR-B-05361) – Laporan Jabatan Kimia Malaysia,
15.	D15	Business insure pack insurance policy
16.	D16	Berjaya Sompo general form claim
17.	D17	Report on fire damage claim from Crawford & Company Adjusters (M) Sdn Bhd
18.	D18	Final report from Forensic Services Sdn Bhd
19.	D19	First report from McLaren Saksama (M) Sdn Bhd
20.	D19A	Final report from McLaren Saksama (M) Sdn Bhd
21.	D18B	Supplementary and final report from McLaren Saksama (M) Sdn Bhd

THE ISSUES

[20] The issues for determination, as may be gleaned from the cause papers, are:

(a) whether the defendant had breached the terms of the management agreement? A

(b) whether the plaintiffs had carried out renovations to the building?

(c) if the answer to (a) and (b) are in the affirmative, whether the plaintiffs are entitled to claim the cost of the renovations? B

(d) did the plaintiffs or their agents/servants deliberately set fire to the building? and

(e) if the answer to (d) is in the affirmative, what is the emasure of damages that the defendant would be entitled to claim? C

The first issue: Whether the defendant had breached the terms of the management agreement?

D

[21] The plaintiffs' contention is that the defendant had breached the terms of the management agreement when he had applied to have all the business licences terminated. The defendant denies ever having made any such application to DBKL and states that if at all any such application had been submitted to DBKL then it must have been done so by or at the behest of the plaintiffs by forging the defendant's signature onto the application forms as part of their plan to unlawfully enrich themselves by making the present claim and to further make a false insurance claim against Berjaya Sompo Insurance Bhd. E

F

[22] The plaintiffs rely on the documents at pp 17–19 and 21–34 of Bundle B1 as evidence in support of their contention that it was the defendant who had made the application to DBKL to cancel the licences. These documents are photocopies of the application form for the cancellation of the aforesaid licences. The defendant denies that the signatures on these forms are his and contends that they are forgeries. In the circumstance of the defendant's contention, it is incumbent upon the plaintiffs to prove, on a balance of probabilities, that it was the defendant who had applied to have the business licences cancelled and that the signatures appearing on the form were the defendant's. G

H

[23] The law is well settled that the burden of proof rests upon the party who desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, see s 101 of the Evidence Act 1950 and *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145 (FC). Therefore, the onus of establishing that the defendant applied to have the business licences cancelled by DBKL rests on the plaintiffs. This was reiterated by Low Hop Bing J (later JCA) in *Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673 in the following terms: I

> Under s 101(1) of the Evidence Act 1950, whoever desires the court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. In other words, the plaintiff must prove such facts as the plaintiff desires the court to give judgment as to its right to claim against the defendant or the defendant's liability to pay the plaintiff. The burden of proof is on the plaintiff: s 101(2). In order to succeed here, the plaintiff must prove its claim affirmatively.

[24] The plaintiffs contend that since the defendant alleges that the signatures on the DBKL forms are forgeries, the onus is on the defendant to prove that they are forgeries. I am afraid that I cannot accept that contention. The onus of proving the genuiness of the signature on the relevant forms rests on the plaintiffs. The defendant could not be required to prove the negative. In this regard the High Court decision of *Chiew Lip Seng v Perwira Habib Bank (M) Bhd* [1999] 1 MLJ 310 is most instructive. The plaintiff in that case had claimed that the charge of his property to the defendant was done without his knowledge and that the signature on the charge attributed to him was a forgery. The defendant argued that the plaintiff had failed to call the attesting officer to prove that he did not sign the charge. The High Court held that it was for the defendant to prove due execution when the plaintiff alleges forgery and that it was the duty of the defendant to call the attesting officer to testify. The following passages from the judgment of NH Chan J (as he then was) in *Chiew Lip Seng v Perwira Habib Bank (M) Bhd* is of relevance here:

> Here the plaintiff denies that the charge was executed by him. Section 68 of the Act provides that for the purpose of proving the execution of a document required by law to be attested, which is the charge in the present case, the attesting witness has to be called. It seems to me that that throws the onus on the defendant who has to prove that the charge was executed by the plaintiff.

See also the case of *Tiagaraja a/l Palaniandy (as the administrator for the estate of Palaniandy a/l Pichay Karan, deceased) v Moganadas a/l Maniam (as the personal representative of Maniam a/l Kathan, deceased) & Anor* [2011] 7 MLJ 326 for an application of this principle.

[25] The issue that arises then is whether the plaintiffs have discharged their burden of proof. I find that the plaintiffs have failed to do so. Not only is the plaintiffs' allegation that the defendant had applied to DBKL to cancel the license for the karaoke business completely unfounded, it is clear from the evidence that it is more probable than not that the application for the cancellation of the license was done by the plaintiffs as part of a scheme undertaken by them to make a false insurance claim, as elaborated below.

[26] The defendant was clear and unequivocal in his testimony (notes of proceedings pp 311–315) that he did not apply to cancel the business license with DBKL nor is there are reason for him to do so. The defendant denies the

signatures on the application form for cancellation. I agree with submissions of counsel for the defendant that the alleged cancellation of the business license by the defendant is absolutely misconceived and not logical, for the follwing reasons:

(a) the plaintiffs have offered no plausible explanation as to why the defendant would want to terminate the DBKL licenses for the karaoke business when he had readily entered into a management agreement that provides him with lucrative monthly returns for several years;

(b) the DBKL license would naturally expire at the end of the year, ie on 31 December 2012. The cancellation form was dated 28 December 2012. If it was true that the defendant intended to cancel the business licenses, he could have easily chosen not to apply for renewal of the said licenses and let them expire. There is no necessity for the defendant to take the trouble to apply to cancel the business licenses;

(c) in fact, there is absolutely no evidence showing any benefit that the defendant stood to gain from the cancellation of the licences; and

(d) once the defendant knew of the cancellation of the licences, he had immediately taken steps, including writing to and liaising with DBKL, to revoke the cancellation of the licences and reinstate them.

[27] In light of this, I accept the defendant's submissions that the following circumstances show, that in actual fact it was the plaintiffs who had applied to cancel the business licenses:

(a) during cross-examination, the DBKL Officer Wan Noorzulina bt Wan Hussin ('PW1') testified that the cancellation form need not be sumitted by the defendant or the license holder and that it can be submitted by any third party. PW1 also confirmed that the DBKL licencing unit would only verify and cross-check the details in the form with DBKL records (notes of proceedings pp 30–31). In fact PW1 has no knowledge as to whether the defendant signed the form and submitted the same to DBKL;

(b) it is unusual that DBKL has permitted the original documents relating to this cancellation to be destroyed and for some reason, only a photocopy of the cancellation form was available in their records. No explanation was offered by PW1 as to why the original was destroyed but yet a photocopy of the said impugned form was kept in file. PW1 also admitted that although she is aware that as a government agency, DBKL is under a statutory duty pursuant to the National Archives Act 2003 to maintain copies of all documents for a period of six years, the said documents in respect of the cancellation of the license had been destroyed, purportedly because of lack of storage space;

(c) ultimately, from the evidence of PW1, it can be gathered that anyone could forge the defendant's signature and submit the cancellation form without the defendant's knowledge (notes of proceedings pp 27–33). It must be noted that all correspondence from DBKL in respect of the application for cancellation of license was addressed to the building. It is inconceivable that the defendant would submit for cancellation of the business licenses and request correspondence to be sent to the building which was then in the possession of the plaintiffs;

(d) it has been established from the evidence of the DBKL officer that when DBKL officers had attended at the said building on 18 January 2013 to carry out an inspection prior to the cancellation of the license, the said officers had noted that there was no business operations taking place on that day and they had confirmed that the plaintiffs had ceased business operations at the building. The witness then went on to state that, DBKL had proceeded to cancel the license upon obtaining this confirmation from their on site investigation (notes of proceedings p 24); and

(e) during cross-examination of the second plaintiff ('PW2'), he was asked to explain why their Karaoke business at the building was closed on the very day when the DBKL officers came to carry out their inspection for the purpose of cancellation of the license. PW2 was not able to give a comprehensible or reasonable answer. The building and the karaoke business operations had been under the full control of the plaintiffs at the relevant time and therefore the closure of the karaoke business on the date of inspection by DBKL can only have been done by the plaintiffs and not the defendant (notes of proceedings pp 731–732).

[28] The overall evidence is indicative of the fact that the plaintiffs knew that the DBKL officers were coming for an inspection prior to the cancellation of the licences. Therefore the closure of business and inspection by DBKL officers on that day cannot be a mere coincidence. The defendant contends that the business closure on that day was done by the plaintiffs in anticipation of the inspection by DBKL to ensure that the inspection would confirm that the karaoke business had indeed been closed to facilitate the cancellation of the license. I find this plausible when the overall probabilities of the case is considered. The facts and circumstances leading up to the fire and the events subsequent thereto shows that the plaintiffs had undertaken the exercise of forging the defendant's signature on the cancellation form in furtherance of their plan to set fire to the building and to make a false insurance claim when they had no insurable interest.

The second issue: Did the plaintiffs carry out the renovation works to the building?

[29] Now I move on to the question of whether the plaintiffs had carried out renovations works to the buidling as claimed. In their pleadings the plaintiffs allege that they have fully paid for the renovation works in the sum of RM3,424,023. However, I find that the plaintiffs have failed to produce any credible documentary evidence to show the payment of such a big sum of money. I accept the the defendant's contention that in this case where payment amounting to millions had been expended, there ought to be some independent records which the plaintiffs can trace (ie bank statements or cheque images etc) especially when the alleged renovation was for commercial purpose. However, none were produced.

[30] During cross-examination, the first plaintiff ('PW4') admitted that the plaintiffs' partnership, New Goldmine Enterprise, had a bank account, yet no plausible reason was given as to why payments were not effected through the bank account, as would be ordinary business practice, instead large amounts of cash payments are said to have been made to contractors without proper records (notes of proceedings pp 726–728). This, I find incredible.

[31] The plaintiffs' case is made more incredible by the testimony of PW4 which is in direct contradiction with the averment of PW2 in his affidavit verifying list of documents issued under O 24 r 5 of the Rules of Court 2012 affirmed on 17 July 2014 (encl 21) filed pursuant to the defendant's application for inspection of documents referred to in pleadings. In that affidavit PW2 had stated that all payments made to the contractors were in cash obtained from other sources and individuals and there is no record of bank transactions for these payments. In this regard, I accept the defendant's submissions that these inconsistencies appeared to make it apparent that the plaintiffs' claim is a mere sham.

[32] The plaintiffs' alleged payment of the renovation costs in the sum of RM3,424,030 to the contractor was apparently made in cash within a period of a few weeks. The plaintiffs evidence was that the several cash payments were made on the date and in the amounts as shown below:

DATE	AMOUNT
7 August 2012	RM100,000
15 August 2012	RM150,000
22 August 2012	RM150,000
29 August 2012	RM200,000
5 September 2012	RM200,000
12 September 2012	RM200,000
20 September 2012	RM180,000

26 September 2012	RM150,000
5 October 2012	RM120,000
11 October 2012	RM150,000
30 October 2012	RM200,000

[33] Now, such evidence is totally illogical and unbelievable considering the payment amount to several million Ringgit. This is a claim for renovations done to business premises. Surely any prudent businessman would keep proper records of such large payments for accounting and tax purposes. In the absence of any supporting documents evidencing these payments in the form of banking records, at the very least, would render the plaintiffs' version of events completely irrational and unbelievable, and in the absence of credible independent evidence, I am unable to accept such evidence. The plaintiffs themselves have given contradictory evidence in respect of the manner in which their funds are managed and their failure to produce any cogent documentary evidence to show the existence of such funds is enough reason for this court to accept the defendant's submission that the plaintiffs' claim is nothing but a sham.

[34] Yang Chow Yong ('PW5'), whom the plaintiffs claim is the main contractor who had carried out the purported renovation works, testified that he had received part of the payment for the renovation and that a sum of RM1,624,030 remain unpaid. This appears to be contradictory to the plaintiffs' pleadings where they had stated that they had spent ('*membelanjakan*') a sum of RM3.5m for renovation. In any event, I find that the evidence provided by PW5 is unsupported by any documentary evidence and in any event is not in line with ordinary construction practice. There is no evidence of the main contractor submitting periodic claims for work done, which would be the norm in any construction contract of this nature. The works claimd to be done by PW5 is similar in nature to the extensive renovations works carried out the defendant several months before he handed over the premises to the plaintiffs in September 2012.

[35] During cross-examination PW5 testified that he received the sum of RM1,800,000 from the plaintiffs but immediately gave all the money which he had received to his subcontractors without keeping even a single cent for himself (notes of proceedings pp 175–178). I find it difficult to accept this testimony as:

(a) no documents were produced to show the existence of any such subcontractors and/or the fact that they had received any such payments from PW5;

(b) it is completely irrational and defies belief that PW5 had collected such a large amount of cash from the plaintiffs and had immediately travelled

to meet his 'subcontractors' and thereafter immediately effected payment to them for the work that they had allegedly done at the said building without obtaining any receipt or acknowledgement of payment from the said subcontractors;

(c) it is absurd to even suggest that a main contractor would so generously distribute every single cent of the payment that he had received from his client to all the subcontractors without retaining a single cent for himself towards account of his charges for work done;

(d) it defies logic that the main contractor did not keep a record of how much profit or commission he would have earned from the plaintiffs;

(e) it appears that the main contractor never bothered to issue a letter of demand to the plaintiffs for non-payment of his alleged charges after the renovation works were alleged to have been done in 2012. Neither was there any contemporaneous documents produced either by the plaintiffs or PW5 to support their contention that the plaintiffs had agreed to pay PW5 from the outcome of this suit; and

(f) although the plaintiffs' contractor's invoices were produced, there was no document to show work done in stages and interim payment certificates issued by the contractor to the plaintiffs. In view of the value of the renovation works (ie RM3m plus), it is completely against normal construction practice for the contractor not to have issued any of these documents to show the progress of work done.

[36] The plaintiffs have produced various invoices and vouchers to prove the alleged renovation works. The defendant submits that these invoices are false documents manufactured by the plaintiffs' to support their claim against the defendant. I am in agreement with the defendant and find that the falsitiy of the plaintiffs' claim becomes apparent upon comparing the plaintiffs documents with documents produced by the defendant in respect of extensive renovation works on the said building between year 2010–2011 carried out by the defendant via his companies. The defendant testified that barely about a year before the plaintiffs took over the management of the karaoke business he had carried out extensive renovation works to the building. The entent of the works were shown by the relevant plans and bills of quantity tendered. The defendant had also produced bank statements and scanned cheque images to show payments that had been made by his companies against the invoices/quotation for the renovation works done by various contractors.

[37] I find that there is ample documentary evidence showing that the defendant had carried out extensive renovation works to the building in the years 2010/2011. In light of this evidence, it defies logic for the plaintiffs to

have carried out similar renovation works to the building, hardly a year later. This finding is further fortified by the findings of the loss adjuster ('DW13') appointed by the plaintiffs insurers. DW13 confirmed that the:

> ... invoices from renovation contractor, MST Decoration — facts and information gathered thus far do not in any way substantiate the insured's contention that they have carried out the renovation works claimed and thus, the authenticity of the invoices submitted by MST Decoration could not be established.

Therefore, on the totality of the evidence, I find that the plaintiffs' claim is nothing but a sham, as:

(a) the evidence overwhelmingly shows that the alleged renovation works by PW5 is a mere concoction; and

(b) in light of the non-existent renovation works the invoices produced by the plaintiffs are fabricated.

[38] This finding of mine is further fortified by the inconsistent and contradictory evidence in respect of the relevant timelines given by the plaintiffs and their witnesses throughout the proceedings in respect of the alleged renovation works. According to the testimony of the plaintiffs and their witnesses, the alleged renovation works was carried out from the month of August until the end of October or early November 2012. The plaintiffs further state that during the renovation period they did not carry out any business activities, meaning that business commenced only after renovations were completed sometime in early November.

[39] However, I find that the plaintiffs and their witness had given inconsistent evidence on the timeline between renovation works and the commencement of the business operation of the karaoke. As a starting point, in their statement of claim, the plaintiffs pleaded that they had started to operate the karaoke business on 5 September 2012. This is consistent with the defendant's assertion that he had handed over the building with an ongoing business to the plaintiffs on 5 September 2012 and that the building did not require any renovations. Whereas, during cross-examination, PW4 said that they started to operate the business only in the first week of November (notes of proceedings pp 151–152).

[40] Similarly, PW2 gave contradictory evidence as regards the commencement of the operation of the karaoke business (notes of proceedings pp 41–42). At first he said that the business commenced in November 2012. Subsequently, when he was recalled for further cross-examination, PW2 admitted that the plaintiffs had started to operate the karaoke business several weeks before 4 October 2012 (notes of proceedings pp 732–736).

[41] Additionally, PW4's evidence is inconsistent with the contractor PW5's testimony in respect of the same. According to PW5, during the entire renovation period, there was no business in operation (notes of proceedings p 164). Whereas PW4 had stated that the business operations had commenced in parts of the building where renovation works had been completed (notes of proceedings p 152). The evidence of the plaintiffs and their witnesses were consistently shifting, as sand shifts in time with the blowing wind.

[42] The fact that the plaintiffs were carrying out business at the building sometime in October 2012 was confirmed by the independent evidence of the loss adjuster who had carried out an analysis on the plaintiffs' bank statements and found that there were receipts of credit card payments from the month of October 2012. Such credit card payments indicated that the karaoke business was in operation in early October 2012 and did not commence in early November 2012 after completion of the renovation works as contended by the plaintiffs.

[43] Furthermore, there were advertisements placed by the plaintiffs in a Chinese newspaper, The China Press Bhd, for the months of October, November and December 2012, wherein they were promoting the opening of the new business. The advertisement on 18 October 2012 which has been translated to English and certified as true translation by Tan Sock Kim ('DW6'), the certified translator, contains a statement to the effect that the plaintiffs have started operating the karaoke business. Thus, the plaintiffs' own advertisement contradicts their claim now that they had carried out renovations works from August to early November 2012 and did not operate the karaoke business during this period.

[44] The advertising sales executive from *The China Press*, Gooh Jooi Seng ('DW5') tendered a set of advertisements by the New Goldmine, invoices, payment vouchers and advertisement space order forms. DW5 further confirmed the said advertisements were published at the request of PW2, (notes of proceedings p 400).

[45] A very crucial and obvious flaw in the plaintiffs' claim is the fact that they had successfully obtained approval for issuance of the fire insurance from Berjaya Sompo in respect of the alleged renovation works on the said building by 1 October 2012. Under cross-examination by learned counsel for the plaintiffs, the officer from Berjaya Sompo, Teo Chang Huay ('DW4'), confirmed that before the approval of the policy in favour of the plaintiffs, Berjaya Sompo had sent their risk surveyor to conduct a due diligence of the 'furniture, fixtures and fittings and the stock in trade' that was to be insured upon the application of the plaintiffs (notes of proceedings pp 622–623). Based on this confirmation and further considering that the policy issued by

Berjaya Sompo was with effect from 1 October 2012, the only logical conclusion that can be drawn is that the renovation works that was to be insured by the plaintiffs and that which was inspected by the risk surveyor had already been in place in the building prior to 1 October 2012. Therefore, it is abundantly clear that the only renovation works that were ever done on the building was that which was done by the defendant in 2010 and 2011, and not the alleged renovations done by the plaintiffs; and crucially this is the subject matter of the insurance policy issued by Berjaya Sompo. Thus, it is clear that the plaintiffs did absolutely no renovation works to the building and almost immediately after taking possession of the building sometime on 5 September 2012 went about to insure the furniture, fixtures and fittings, knowing well that did not have any insurable interest in the same. Thus, I find that, this was nothing but a part of the plaintiffs plan to destroy the building by fire and to make a fraudulent insurance claim on Berjaya Sompo.

[46] It is also a contractual requirement vide cl 9 of the management agreement ('D4') that the plaintiffs procure consent from the defendant before carrying out any renovation works on the building. Clause 9, which is one of the covenants of the plaintiffs, reads:

> To maintain all the interior renovation and the exterior of the said Premises in good condition and *not to carry out any alterations to the Licensee and without the writing approval from the Licensee and the relevant Government Authorities*.

However, the plaintiffs' have failed to produce any evidence to show that they have obtained such consent from the defendant. Furthermore, the defendant has denied that such request for consent to renovate was ever made to him in the first place. This failure on the part of the plaintiffs further fortifies the defendant's position that no renovation works were carried out by the plaintiffs.

[47] The plaintiffs argue based on their version of the management agreement ('P1') that cl 9 in that the management agreement does not require the consent of the defendant before the plaintiffs carry out any renovation works. In this regard, it would be necessary for me to make a finding as to which of the two management agreements are the authentic and authoritative. Having considered the evidence, I am more inclined to accept the defendant's version of the management agreement ('D4') as the actual and authoritative agreement and further find that cl 9 therein is applicable in the circumstance. The document examiner from Department of Chemistry of Malaysia, Siti Nur Musliha bt Mohd Noor ('DW8'), who had examined the signatures and initials of the defendant on exh P1, testified that the impugned initials of the defendant on pp 1–6 of exh P1 'may not have been written by the writer of the specimens' — meaning that the defendant is probably not the author of the

signature and initials found at the bottom of the pages in exh P1. I find no reasons to disregard this evidence as DW8 has well explained the reasons forming the basis for her conclusion.

[48] Further, it is also pertinent to note that during trial it transpired that the plaintiffs had submitted a different version of an unstamped management agreement to the loss adjuster appointed by Berjaya Sompo Insurance Bhd to investigate the plaintiffs' insurance claim. Crucially, it can be seen that the second management agreement produced by the plaintiffs to their insurers confirms the fact that the management fee payable by the plaintiffs to the defendant was RM55,000 which was consistent with exh D4 and not exh P1. This was also contrary to the oral evidence of the plaintiffs.

[49] When the second plaintiff ('PW2') was recalled for further cross-examination, he could not provide any explanation as to why this second version of the management agreement that was given to the insurance adjusters was different from the version that the plaintiffs had provided to court (exh P1). Eventually, he admitted that the defendant's version of the management agreement (exh D4) is the actual agreement (notes of proceedings pp 727–728).

[50] The inconsistencies in the narrative by the plaintiffs and their witnesses are so apparent that the only reasonable conclusion to be made is that the plaintiffs' claim is a mere sham. In light of the above shenanigans of the plaintiffs, and the lack of any cogent evidence in support of their claim, it is only reasonable to conclude that the plaintiffs have failed to establish their case.

[51] In any event, even if I were to find that the plaintiffs had carried out the renovations, they would be unable to make any claims for the same as the their destruction arose from their deliberate and wrongful act of setting fire to the building, as will be seen below. In the circusmtance, it is trite that the plaintiffs cannot in law claim for damages arising from their own wrongful or unlawful acts. In *Alghussein Establishment v Eton College* [1991] 1 All ER 267 (HL) the House of Lords reiterated the principle that the party in default cannot take advantage of its own wrong in the following words:

> The principle that a party in default under a contract cannot take advantage of his own wrong is in general a rule of construction rather than an absolute rule of law and morality, though there may exist situations, such as self induced frustration, where an absolute rule exist ...

That principle was applied by the Court of Appeal in *Penguasa (Jabatan Tanah & Survei, Bintulu) & Ors v Amit bin Salleh & Ors* [2008] 4 MLJ 567; [2008] 4 CLJ 143 where James Foong JCA (later FCJ) in delivering the judgment of the court held that:

> Quite apart from the construction of para 1(3)(b) of the First Schedule, there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: a party ought not to be permitted to take advantage of his own breach, see: *Alghussein Establishment v Eton College* [1988] 1 WLR 587; *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1.

In the circumstance, that principle will apply here and would disentitle the plaintiffs of the reliefs that they seek in this action.

The defendant's counterclaim

[52] Now I move on to consider the defendant's counterclaim, and in particular the defendant's allegation that the plaintiffs and/or their agents or servants had deliberately started the fire that had substantially destroyed the buidling.

[53] The defendant submits that the fire which broke out at the building on 5 March 2013 was premeditated and deliberately caused by the plaintiffs and/or through their employees and/or agents with the ulterior motive to financially gain from the fire insurance policy that they had obtained from Berjaya Sompo on false pretense and representation.

[54] The defendant submits that the aforesaid fire insurance policy was unlawfully obtained as it was procured merely based on a quotation without any supporting documents to establish or proof that the plaintiffs have an insurable interest in properties in the building. In *Standard Chartered Bank v KTS Sdn Bhd* [2006] 4 MLJ 617; [2006] 4 CLJ 79, the Federal Court held that:

> ... to constitute an insurable interest the person insuring the property must have a legal or equitable interest in the property insured.

[55] The defendant submits that the plaintiffs have any legal or equitable interest in the building or its furniture, fixtures and fittings. The defendant contends that the plaintiffs were merely occupiers and operators of the business of the defendant, wherein the ownership of the building and its contents remained with the defendant.

[56] I am in agreement with the above submissions of the defendant. I have already determined that the plaintiffs had not carried out any renovation works to the building. As such, based on the facts that renovation works had been carried out by the defendant barely one year before the plaintiffs' took over the management of the karaoke business, the furniture, fixtures and fittings that

were damaged in the said fire were the property of the defendant and not that of the plaintiffs. The plaintiffs were merely the managers and operators of the karaoke business without any legal or equitable interest in the building or its furniture, fixtures and/or fittings. Therefore, it is my finding that the plaintiffs do not have any insurable interest in the building or its furniture, fixtures and/or fittings.

[57] Despite not having any insurable interest in the properties in the building that were destroyed by the fire, the second plaintiff went on to obtain the relevant documents from the Fire and Rescue Department ('*Bomba*') to submit an insurance claim from Berjaya Sompo. Teo Chang Huay ('DW4'), senior manager of Claims Department, Berjaya Sompo Insurance Bhd, confirmed in his testimony that an independent loss adjuster had conducted an investigation on the plaintiffs' claim and found that the plaintiffs had made a false declaration in respect of their ownership of the property insured and thus the plaintiffs' insurable interest on the renovation works done at the building could not be established. As a result, the witness confirmed that the said policy was repudiated by Berjaya Sompo.

[58] The plaintiffs' act of taking out a fire risk insurance policy on property in which they do not have any insurable interest provides an interesting clue to the origins of the fire that substantially destroyed the building. There are two reports tendered in court on the cause of the fire; one by the plaintiffs and the other by the defendant. The one by the plaintiffs was prepared by Rohaizat Ruzali ('PW3'), fire investigating officer ('pegawai penyiasat kebakaran') from *Bomba*. Whilst the one by the defendant was prepared by Ms Aini Ling Juh Chin ('DW11'), a specialist fire investigator from Forensic Services (M) Sdn Bhd who was instructed by Berjaya Sompo to carry out a forensic investigation into the cause of fire at the building.

[59] PW3 prepared a fire investigation form called *laporan mengenai punca kebakaran* dated 19 March 2015 and subsequently tendered a substantive report known as *laporan penyiasatan kebakaran* ('the said fire investigation report') in court. From his investigation, PW3 was of the opinion that:

(a) the fire originated from the panel box situated at second floor;

(b) the fire was caused by electrical short circuit as a result of resistant heating due to poor connection of the wiring system;

(c) there was only a single source of ignition which was at the second floor of the building; and

(d) the cause of fire was 'accidental'.

[60] On the other hand, DW11 had tendered a comprehensive forensic report dated 28 October 2013 and testified that:

(a) her investigation revealed that fire had been deliberately ignited at multiple locations in the premises;

(b) ignitable liquids (petroleum, kerosene) were detected in samples collected from the building, and there were no legitimate reasons for their presence in the building;

(c) the building was indicated to have been secured before the last persons left. The last persons to leave the building at 4.54am were the plaintiffs' employees. There was no evidence of break-in (forced entry) from the outside. As such, the deliberate ignition of the fire at the building was most likely carried out by the person(s) with access to the keys to the building; and

(d) CCTV cameras were installed at the building but the decoders were removed from the locations. Upon DW11'S request, the decoders were produced and submitted by the second plaintiff to DW11 for restoration and data retrieval but it was discovered that one of the decoders did not have a hard disk for data storage and another decoder had a hard disk but was found to be void of data.

[61] Another witness, the chemist from Forensic Services, Tan Sok Ling ('DW12'), tendered her chemical analysis report on the samples collected at several fire damaged sections of the building. DW12 confirmed that the samples contained positive residues of an ignitable liquid consistent with petrol and/or kerosene.

[62] I am more inclined to accept the evidence of DW11 and DW12 on the cause of the fire as being deliberate set at multiple points by persons in control of the building with the aid of ignitable liquid in the form of petrol and/or kerosene. My reasons for that preference are as follows. Firstly, DW11's forensic report comprehensively explains and provides evidence supporting the conclusion/opinion that she reached on the cause of fire as opposed to the report produced by PW3. In *Sim Ah Song & Anor v Rex* [1951] 1 MLJ 150; [1951] 1 LNS 83, Brown Ag CJ held that:

> The business of an expert witness is to draw upon the store of his knowledge and experience in order to explain some matter which his experience should qualify him to understand. He is quite entitled to express his opinion, which indeed is the natural corollary of his explanation. But a bare expression of his opinion has no evidential value at all. Unless he gives an explanation which supplies the understanding of the subject which the court lacks, the court is in no better position than it was before to determine the question which it is its duty to determine, and if the court acts upon a bare expression of the expert's opinion the determination of the question becomes that of the expert and not of the court.

Likewise in *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61; [1997] 2 CLJ 153, the Federal Court reaffirmed that:

> It is trite law that the principal object of expert evidence is to assist the court to form its own opinion. An expert should give his reasons. The court is the final arbiter and not the experts or eye-witnesses.

And further, Adams J in *Sim Ah Oh v Public Prosecutor* [1962] 1 MLJ 42 at p 43; [1961] 1 LNS 124 held:

> The evidence of the expert must be tested like any other evidence against the facts upon which he is deposing. The expert should have been asked by the prosecutor to elaborate and give his reasons.

[63] The report and oral testimony of the DW11 is is not only comprehensive but is well reasoned. DW11 stood her ground despite the relentless cross-examination by learned counsel for the plaintiffs. DW11 is certified as a fire investigator by the International Association of Arson Investigators. She had testified as expert witness in various courts in Malaysia and the Philippines, and her credential and evidence on her qualifications as an experienced forensic expert was not disputed. The witness has gone to great lengths to investigate the scene of the incident and to look into all possibilities and fire hazards in existence within the building that could have caused the fire but ultimately came to the conclusion that the fire was deliberately caused for reasons that she had enumerated and explained in her report.

[64] In construing the cause of fire, the court has to give due consideration to the opinions of experts who had testified. In the case of *Berjaya Sompo Insurance Berhad v Nilai Porcelain Inn Sdn Bhd* [2015] 4 MLJ 128 the Court of Appeal set aside the decision of the High Court for failure to consider the significance of the forensic investigator's evidence conclusively establishing that the fire was caused by deliberate act, and I do not wish to fall into similar error. Therefore, I have given due consideration to the forensic investigator's ('DW11') evidence, as well as the evidence of PW3. Furthermore, DW11's findings on the multiple source of ignition are consistent with the evidence of Imam Bukhari bin Sisami ('DW9'), Penolong Kanan Penguasa Bomba, as opposed to PW3 (notes of proceedings pp 468–472 and 491–492). At the outset of the cross-examination, PW3 confirmed that the investigation carried out by the Fire Department did not include any forensic investigation carried out at the scene of the fire and that it was limited to a visual inspection only (notes of proceedings pp 114–115). PW3's investigation is very superficial. Therefore, I find that there is insufficient cogent evidence in the report of PW3 to support his conclusion that the fire was accidentally caused. Thus, when compared to the report of DW11, the findings by PW3 is incomplete and inconclusive; and is of no help to the court. DW11's finding that there were multiples origins of

the fire which had started almost simutaneously with the aid of combustible material is very convincing.

[65] Now, has the defendant discharged his burden of proof to establish arson on the part of the plaintiffs. In *Berjaya Sompo Insurance Berhad v Nilai Porcelain Inn Sdn Bhd* [2015] 4 MLJ 128, the Court of Appeal held that the 'deliberate act of starting a fire in arson cases can be proved by circumstantial evidence'.

[66] The plaintiffs who were in control and possession of the building at the material time did not give any plausible reasons for the presence of combustible liquid in the form of petrol or kerosene at various places where the ignition was found to have started. It is undisputed that from the month of September 2012 right up to the day of the fire, the plaintiffs and or their employees and/or agents had control, possession and access of the building. In fact, the plaintiffs continued to be in possession and control of the building even after the fire until they proceeded to terminate the management agreement whereupon possession was deemed returned to the defendant.

[67] In the absence of any break-in or forced entry into the building, and based on the fact that it was the employees of the plaintiffs who were last to leave the building at 4.54am, ie shortly before the fire was detacted, it is only reasonable to conclude that the plaintiffs and/or their servants or agents were responsible for the deliberate ignition of fire at multiple points using highly combustible material, the traces of which were detached via scientific analysis and forensic investigation.

[68] The plaintiffs had obtained a fire insurance policy in respect of renovation works for which they clearly had no insurable interest. Thus, the plaintiffs had a clear motive to deliberately set fire to the building; and that is to make a false claim on the fire risk insurance policy.

[69] In coming to that conclusion, I have taken guidance of the Federal Court's pronouncement in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1, that in civil claims involving fraud or fraudulent conduct, the claimant would need only to prove his case on the balance of probabilities. Therefore, the standard of proof to be discharged by the defendant herein to establish the plaintiffs' fraudulent conduct of deliberating setting fire to the building, is on a balance of probabilities. Therefore, when the overall probabilities in the present case are considered, I find that there is significant circumstantial evidence that establishes the plaintiffs' involvement in setting the fire or causing the fire to be set in the building. Therefore, I find that the defendant has successfully established its claim for damages arising from arson by the plaintiffs.

QUANTUM OF DAMAGES

[70] The defendant would be entitled to claim for losses arising directly from the plaintiffs' deliberate act of setting the building on fire. See *Re Polemis and Furness, Withy & Co, Ltd* [1921] All ER Rep 40; [1921] 3 KB 560, where the English Court of Appeal held that:

> ... if a reasonable man would have foreseen any damage to the plaintiff as likely to result from the defendant's act, then he was liable for all direct consequences of it suffered by the plaintiff whether a reasonable man would have foreseen them or not, that is, if they were directly traceable to the act and not due to the operation of independent intervening causes.

[71] The defendant claims damages for diminution in the value of the building based on the fact that he had to sell the building at a price well below the market value. Azmi bin Deris ('DW10'), a registered valuer, confirmed that the market value of the building as at 20 February 2014 was RM10,580,000. The plaintiffs did not call their own property valuer to provide any evidence to rebut the expert opinion of DW10 in respect of the market value of the building. DW10 has given the basis for his valuation, which I accept as being reasonable in the circumstance, and is in accordance to accepted norms. In *Dr Lo Sook Ling Adela v Au Mei Yin Christina & Anor* [2002] 1 SLR 408, the Singapore Court of Appeal said that:

> ... while the court is not obliged to accept expert evidence by reason only that it is unchallenged, if the court finds that the evidence is based on sound grounds and supported by the basic facts, it can do little else than accept the evidence.

Likewise, based on the sound reasoning advanced by DW10, I have accepted his evidence as to the market value of the building to be RM10,580,000.

[72] There is uncontroverted evidence that as result of the substantial fire damage, the defendant had to force sell the building at a price of RM6m. That sale is evidenced by the terms of a sale and purchase agreement dated 8 July 2013. The diminution in the sales value is thus RM4,580,000. The defendant had received the sum of RM2.7m from his insurance company for the fire damage to the property. I have deducted this sum from the sum of RM4,580,000, thus leaving the nett sum of RM1,880,000, which I allowed as damages under this head.

[73] Additionally, by their unlawful acts the plaintiffs had breached the management agreement in that the building was no longer suitable for the karaoke business. This resulted in the defendant suffering loss of income that he would have received for the remaining 34 months period of the management agreement for the period between March 2013–December 2015, ie the monthly management fee of RM55,000. The total amount under this

head of loss is RM1,870,000. The plaintiffs are liable to compensate the defendant for the loss of this income. Thus, I allowed the sum of RM1,870,000 under this head.

[74] When pronouncing my judgment, I had tallied up both this sums of RM1,880,000 and RM1,870,000 and had made a error. I had pronounced the total as RM3,650,000, when in fact it should be RM3,750,000. I would respectly ask the Court of Appeal to correct this error on my part.

[75] Therefore, I find that the defendant had suffered a loss of RM3,750,000 directly arising from the unlawful act of the plaintiffs. This, the defendant would be entitled to recover from the plaintiffs, as the settled principle is that the defendant ought to recover the financial loss consequent to the plaintiffs' deliberate and unlawful conduct. This principle of compensatory damages was reiterated by the House of Lords in the case of *Owners of Dredger Liesbosch appellants; and Owners Oof Steamship Edison respondents* [1933] AC 449, where Lord Wright held that:

> ... the true rule seems to be that measure of damages in such cases is the value of the ship to her owner as a going concern at the time and place of the loss.

Therefore, I allowed the sum of RM3,750,000 as general damage.

[76] I also allowed the sum of RM9,900 being the stamp duty paid by the defendant on the management agreement (D4).

[77] I also allowed cost in the sum of RM100,000 for both the claim and counterclaim to be borne and paid by the plaintiffs, which is the aggregate sum suggested by the counsel for the plaintiffs as being reasonable.

[78] Lastly, I awarded post judgment interest at the rate of 5%pa on the judgment sum to be calculated from the date of judgment.

Orders accordingly.

Plaintiffs' claim dismissed and defendant's counterclaim allowed.

Reported by Kohila Nesan